

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-7172

In The
United States Court of Appeals
For The Second Circuit

WALTER J. MEYER,

Plaintiff-Appellant,

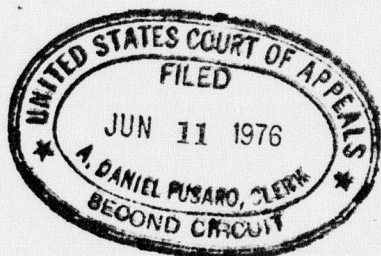
-against-

LOUIS J. FRANK, Commissioner of Police, Nassau County
Police Department, and CHRISTOPHER QUINN, Trial
Commissioner and Inspector, Nassau County Police
Department.

Defendants-Appellees.

*Appeal from the United States District Court for the Eastern
District of New York.*

APPENDIX



DAVID B. AMPEL
IRA LEITEL, *Of Counsel*
Attorneys for Plaintiff-Appellant
103 Park Avenue
New York, New York 10017
(212) 889-8560

(9629)

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J.
(201) 257-6850

New York, N.Y.
(212) 563-2121

Philadelphia, Pa.
(215) 563-5587

Washington, D.C.
(201) 783-7288

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1a
Complaint For Declaratory Judgment (Filed June 6, 1975)	2a
Exhibits Annexed to Foregoing Com- plaint:	
A — Indictment	14a
B — Charges and Specifications	15a
C — Order of Meyer, J. Dated April 27, 1971	17a
D — Order of Dismissal Dated June 4, 1971	18a
E — Order and Judgment Dated July 15, 1971	19a
Affidavit of Ira Leitel in Opposition to Motion For Order of Dismissing Com- plaint (Filed September 16, 1975)	23a
Memorandum and Order (Filed March 12, 1976)	32a
Notice of Motion to Dismiss Complaint (Filed June 30, 1975)	41a

Contents

	Page
Affidavit of Louis Schultz in Support of Motion	43a
Exhibits Annexed to Affidavit of Louis Schultz:	
I — Excerpts of Transcript.	55a
II — Notice of Motion	57a
Affirmation of Martin I. Silberg in Sup- port of Motion.	58a
Order Denying Reargument	60a
Petitioners-Appellants' Brief.	62a

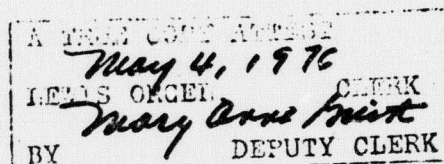
RELEVANT DOCKET ENTRIES

1a

30 898

MEYER vs. FRANK, et ano

NR.	PROCEEDINGS	
3-75	Complaint filed. Summons issued.	(1)
7-16-75	Summons ret and filed/executed.	(2)
6-30-75	Notice of motion ret 7-24-75 for an order dismissing the complaint filed.	(3)
6-30-75	Memorandum of Law in support of motion to dismiss filed.	(4)
7-24-75	Before COSTANTINO, J. - Case called & adj'd to 9-23-75 at 10 A.M.	
7/29/75	By COSTANTINO, J. - Order dated 7/29/75 filed that the time for the parties to make any motions, etc. is extended to Sept. 23, 1975	(5)
9-16-75	Affidavit of Ira Leitel filed.	(6)
9-16-75	Pltff's memorandum of law filed.	(7)
9-23-75	Before COSTANTINO, J. - Case called. Deft's motion to dismiss the complaint adj'd to 10-3-75 at 10 AM.	
10/3/75	Before COSTANTINO, J. - Case called - No appearances - Marked off	
10-17-75	Before COSTANTINO, J. - Case called. Deft's motion to dismiss the complaint submitted. Decision reserved. (mg)	
10-24-75	Deft's reply memorandum of law filed.	(8)
10-28-75	Pltff's reply memorandum of law filed. (mg)	(9)
3-12-76	By COSTANTINO, J. - Memo and order dtd. 3-11-76 dismissing the complaint filed.	(10)
3-15-76	JUDGMENT dtd 3-12-76 dismissing complaint filed	11
3-26-76	PLTFF'S NOTICE OF APPEAL filed. Copy mailed to C of A.	12



BEST COPY AVAILABLE

COMPLAINT FOR DECLARATORY JUDGMENT (Filed June 6, 1975)
 UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF NEW YORK

-----X
 :
 :
 WALTER J. MEYER,

Plaintiff, :
 :

-against- :
 :

LOUIS J. FRANK, Commissioner
 of Police, Nassau County Police
 Department, and CHRISTOPHER
 QUINN, Trial Commissioner and
 Inspector, Nassau County Police
 Department. :

Defendants. :
 :
 -----X

COMPLAINT FOR
 DECLARATORY
 JUDGMENT

Civil Action No.

75 Civ. 898

Constantino, J.

I

1. Plaintiff Walter J. Meyer seeking declaratory relief brings this action founded upon Title 42, United States Code, Sections 1983 and 1985, this being a suit in equity authorized by law, and Rule 57 of the Federal Rules of Civil Procedure, to be brought to redress the deprivation under color of law of rights, privileges and immunities secured by the Constitution and laws of the United States. Sought to be redressed here is the fundamental right not to be compelled to give testimony which could be used in criminal prosecution, as guaranteed by the Fifth Amendment to the Constitution of the United States. By this suit

plaintiff seeks to annul the actions of defendants, who, under color of law, and under color of their authority as police officials of Nassau County, subjected plaintiff to the deprivation of his right not to be compelled to give testimony which could be used to prosecute him criminally, and not to be deprived of the personal liberty to pursue a calling of his choice without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

II

Jurisdiction

2. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Sections 1343(3) and (4), which provide for original jurisdiction of the District Courts in suits authorized by Title 42, United States Code, Section 1983, and by Title 28, United States Code, Sections 2201, 2202.

III

Plaintiff

3. Plaintiff Walter J. Meyer is a citizen of the United States and of the State of New York; and a veteran of the United States Navy. Plaintiff is forty-seven (47) years of age; has

been married since April 28, 1951, and is the father of three (3) children, ages nineteen (19), seventeen (17) and fourteen (14), with whom he resides at 14 Argonne Place, Massapequa, New York. Plaintiff had been a member of the Nassau County Police Department from October 1, 1953 until dismissed on June 4, 1971; serving as a Patrolman until 1960, when he was promoted to the rank of Detective.

4. Prior to the 1970 departmental charges which form the basis for this action, plaintiff never before had departmental charges preferred against him throughout his seventeen (17) year career with the Nassau County Police Department (hereinafter referred to as the "Department").

IV

Defendants

5. Defendant Louis J. Frank is the Commissioner of Police of the Department, and the person who ordered the plaintiff's dismissal from the Department, on June 4, 1971, with loss of pay dating from his suspension from duties on June 25, 1970.

6. Defendant Christopher Quinn is an Inspector of Police in the Department; the person who presided over the plaintiff's

departmental trial, denied plaintiff's counsel's request for a further adjournment of the administrative hearing, found him guilty of the preferred charges and recommended plaintiff's dismissal from the Department.

V

Statement of Claim for Relief

7. On June 25, 1970 a Grand Jury of the County of Nassau indicted both plaintiff and another Nassau County Police Department Detective, Robert J. Cullinan, for the crime of an Attempt to Commit the Crime of Grand Larceny in the First Degree. (Exhibit A, annexed hereto and made a part hereof). Both men entered pleas of not guilty to this charge.

8. On July 2, 1970, the men were charged by the Department with certain violations of the Rules and Regulations of the Department, to wit, conduct unbecoming an officer - attempted extortion, based upon and with the specification limited to the identical charge and allegation for which they stood criminally indicted. (Exhibit B, annexed hereto and made a part hereof). Similarly, pleas of not guilty were entered in this civil, administrative proceeding.

9. With the plaintiff's indictment on criminal charges and the lodging of departmental charges based thereon, he was relieved of all his duties with the Department and suspended from the force without pay. He was no longer in a position to perform police duties of any sort; his gun and shield having both been surrendered.

10. A departmental trial (an administrative hearing) was scheduled for November 30, 1970, and adjourned to January 6, January 27, February 24 and April 8, 1971 due to plaintiff's counsel's actual engagement and upon request of plaintiff's counsel; and then to April 22 at the request of the defendants, due to the Easter holiday season.

11. On April 22, 1971, plaintiff's counsel requested another adjournment. Such motion was denied by defendant Quinn. Plaintiff was then advised by his counsel, John J. Sutter, a well known and noted criminal trial attorney in Nassau County, to stand mute and without the aid of counsel throughout the civil proceeding so as not to incriminate himself or otherwise prejudice the pending criminal prosecution. Nevertheless, at the defendant Quinn's orders, the departmental hearing commenced that day.

12. No cross-examination tested the credibility of the

witnesses on the Department's direct case; and plaintiff, on the advice of counsel, offered no testimony or other evidence in his behalf.

13. While this departmental "trial" was in progress, Mr. Justice Meyer of the New York State Supreme Court, County of Nassau, granted an Order to Show Cause for a judgment of prohibition restricting the defendants from conducting the departmental trial in violation of the plaintiff's constitutional rights, and the fundamental concepts of due process of law. Thereafter, the Court dismissed this proceeding, instituted pursuant to Article 78 of the New York State Civil Practice Law and Rules, for an judgment of prohibition on the grounds that it was premature and that the Court could not assume that the defendants would violate the rights of the plaintiff. Such question, the Court held, would have to await a final determination by the defendants upon the charges. (Exhibit C, annexed hereto and made a part hereof).

14. As a result of plaintiff standing alone and mute throughout the departmental "trial", he was found guilty of the charges by the defendant Quinn, and dismissed from the force, by order of the defendant Frank, on June 4, 1971, with loss of pay dating from his suspension from all police duties which occurred on June 25, 1970, the day of his criminal indictment. (Exhibit D,

annexed hereto and made a part hereof).

15. This was the first and only instance to date in the history of the County of Nassau, that a police officer facing both criminal and resulting departmental charges was forced to trial at the administrative level before his criminal trial took place.

16. The criminal case against plaintiff was called to trial for the first time on January 5, 1972. The plaintiff was tried jointly with Detective Cullinan in the Supreme Court of the State of New York, Nassau County. A jury was selected on January 10, and found a verdict of not guilty as to both men on January 14, 1972.

17. By order and judgment dated July 15 and entered on August 10, 1971, of Mr. Justice Pittoni of the Supreme Court of the State of New York, plaintiff's petition under Article 78 of the New York State C.P.L.R. to review and annul defendants' actions on the sole ground that plaintiff was deprived of his fundamental right to be represented by counsel of his own choosing, and for an order of reinstatement to the Department and a new departmental trial, was dismissed. The Court held:

"There comes a point at which a hearing may no longer be deferred because one particular

attorney is not available. That point was reached in this matter. ... It may not be held that the respondent Quinn was arbitrary or unreasonable in directing the hearing to proceed." (Exhibit E, annexed hereto and made a part hereof).

18. This judgment was affirmed, without opinion, by the Appellate Division of the New York State Supreme Court on October 10, 1972; a motion for reargument was denied on January 19, 1973. In July 1973, motion for leave to appeal was denied by the New York State Court of Appeals.

19. Note is made of the fact that the County Attorney of Nassau County in this Brief before the Appellate Division of the New York State Supreme Court characterized the plaintiff as having "played only a passive role" in the alleged extortion upon which the departmental charges were based; but asserted that Detective Cullinan was "clearly implicated as having a major, active role in the events." Respondents' Brief in the New York State Appellate Division at 14.

20. On January 15, 1974 a verified petition on behalf of the plaintiff was served on defendants asking for a rehearing and reconsideration of the dismissal of plaintiff from the Department. On April 9, 1974, plaintiff was advised in writing that his

application would not be considered.

21. Plaintiff stood mute and alone, on the advice of his counsel, failing to exercise his right to confront the witnesses against him and cross-examine them through his counsel, and to offer proof and to testify in his own behalf, in order not to prejudice himself and his defense at the forthcoming criminal trial by his testimony and proof at the administrative proceeding. He was severely prejudiced by the defendants' actions in demanding that he proceed with the civil hearing, which was based upon exactly the same allegations and charges as the then pending criminal indictment. Plaintiff, faced with this unreasonable demand - the first ever made in the history of the Department - acted accordingly and on his counsel's advice, in the only manner that could insure the protection of his constitutional right not to be compelled to give testimony which could be used to prosecute him criminally. By thus exercising these rights, he was found guilty of the departmental charges and dismissed from the Department by the defendants. This action on the part of defendants denied plaintiff fundamental principles of justice and fair play mandated by due process of law.

22.. By reason of defendants' actions herein plaintiff's reputation has been severely damaged. He has been branded a "Crooked, dismissed cop", an extortioner. The likelihood of his

being considered eligible for other employment in his chosen profession is non-existent. By reason of the action of the defendants, plaintiff is clearly faced with the effective destruction of his capacity to continue the practice of his profession - that of a law enforcement officer.

There has been a clear, immediate and substantial impact on the plaintiff's reputation. This destroys his ability to engage in his occupation, thus effectively depriving plaintiff of the established means by which he has maintained his livelihood.

23. The defendants, as well as the public interest, could in no way have been prejudiced, damaged or compromised by adjourning the departmental hearing at plaintiff's request until resolution of the then pending criminal charges. The plaintiff was suspended from all police duties and functions without pay. His guns and badge had been removed; and he was effectively and completely disassociated from the Department at the time defendant Quinn ordered his departmental trial to proceed.

VI

Prayer For Relief

24. WHEREFORE, plaintiff respectfully prays, upon the filing of this verified complaint, that this Court:

A) Assume jurisdiction of this cause pursuant to Title 28, U.S.C., Sections 1343(3) and (4) to determine the controversy;

B) Enter a declaratory judgment pursuant to Title 28, U.S.C., Sections 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, declaring that the actions of defendants in dismissing plaintiff from his position as a Detective in the Nassau County Police Department were in violation of plaintiff's constitutional rights secured by the Fifth and Fourteenth Amendments to the Constitution of the United States, and therefore a nullity;

C) Enter an Order reviewing, vacating and annulling the determination of defendants that the charges were sustained and that the petitioner be dismissed from the Nassau County Police Department, effective June 4, 1971, and reinstating the petitioner with all back pay, rights, privileges and benefits as of June 25, 1970, the date he was suspended from the Department without pay; or alternately

D) Annul the determination of defendants and remit the matter for a new departmental trial;

E) Grant plaintiff have such other, additional or alternative relief as may appear to the Court to be equitable, just and appropriate;

F) Grant plaintiff his costs and disbursements herein.

DAVID B. AMPEL

By: IRA LEITEL, of Counsel

Attorney for Plaintiff

103 Park Avenue
New York, New York 10017
(212) 889 - 8560

STATE OF NEW YORK,
COUNTY OF NEW YORK, SS.:

WALTER J. MEYER, being duly sworn, deposes and says that he is the plaintiff in the above-entitled proceeding; that he has read the foregoing complaint and knows the contents thereof, that the same is true of his own knowledge.

Walter J. Meyer
WALTER J. MEYER
Plaintiff

Sworn to before me
this day of 1975.

EXHIBITS ANNEXED TO FOREGOING COMPLAINT:

EXHIBIT A - INDICTMENT
COUNTY COURT
OF THE COUNTY OF NASSAU

14a

- - - - -x
THE PEOPLE OF THE STATE OF NEW YORK

-against-

ROBERT CULLINAN and WALTER MEYER

Defendants.

- - - - -x

THE GRAND JURY OF THE COUNTY OF NASSAU, by this indictment,
accuse the defendant of the crime of AN ATTEMPT TO COMMIT THE
CRIME OF GRAND LARCENY IN THE FIRST DEGREE, committed as follows:

The defendants, ROBERT CULLINAN and WALTER MEYER, and each
of them, and each aiding and abetting the other, on or about the
14th day of October, 1969, in the County of Nassau, State of New
York, did use or abuse their positions as public servants by en-
gaging in conduct within or relating to their official duties in
such a manner as to affect the complainant adversely, to wit: the
said defendants, ROBERT CULLINAN and WALTER MEYER, being police
officers of the County of Nassau, on or about the 14th day of Oc-
tober, 1969, in the County of Nassau, State of New York, did
attempt to extort lawful currency of the United States of America
from Anita Trocolli by instilling in the said Anita Trocolli fear
that the defendants would use their official positions as police
officers to arrest her for allegedly possessing stolen property
unless she paid to them a sum of lawful currency of the United
States of America.

Dated: June 25, 1970

WILLIAM CAHN
District Attorney

EXHIBIT B - CHARGES AND SPECIFICATIONS

15a -

POLICE DEPARTMENT
COUNTY OF NASSAU, N. Y.

Charges and Specifications

Mineola, N. Y., July 2, 19 70

To the Commissioner of Police:

I hereby charge Patrolman MEYER Walter J. 2353 Eighth
Rank Surname Given Name Initials Shield No. Command

with: VIOLATING (1) ARTICLE IX, RULES 10 AND 11 OF THE RULES AND REGULATIONS,
POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK

SPECIFICATIONS:

in that 1. On information and belief, Patrolman Walter J. Meyer, Shield Number 2353, Eighth Precinct, did, on October 14, 1969 at, on or about 2200 hours, while assigned to the Automobile Squad as a Detective, conduct himself in a manner unbecoming an officer and prejudicial to the good order and efficiency of the Police Department by attempting, in consort with Patrolman Robert J. Cullinan, Shield Number 2352, Second Precinct, to extort a sum of money from one, Anita Troccoli of 40-15 31st Street, Jackson Heights, New York, resulting in his indictment on June 25, 1970 by the Nassau County Grand Jury for violation of Section 155.40 of the Penal Law of the State of New York.

Complainant

Albert J. Owens
 Albert J. Owens
 Deputy Chief Inspector
 Detective Division

STATE OF NEW YORK)
 COUNTY OF NASSAU) ss.:

ALBERT J. OWENS, being duly sworn, deposes and says; that he is a Deputy Chief Inspector assigned to the Detective Division and the complainant herein. That he has read the foregoing charges and specifications and knows the contents thereof; that the same is true to his own knowledge except as to those matters therein stated to be alleged on information and belief and as to those matters, he believes it to be true. That the sources of deponent's information are the books and records kept by the Police Department and the investigation made by the Police Department, County of Nassau, New York.

Albert J. Owens
 Albert J. Owens

Sworn to before me this

2 day of July 70

Harry E. Andell
 HARRY E. ANDELL
 NOTARY PUBLIC, State of New York
 No. 30 0063250
 Qualified in Nassau County

EXHIBIT B

3454

POLICE DEPARTMENT

COUNTY OF NASSAU, N. Y.

Charges and Specifications
with

Notice of Examination

In re Complaint

—vs.—

MEYER Surname	Walter Given Name	J. Initials
Patrolman Rank	2353 Shield No.	Eighth Precinct Command

FIRST ENDORSEMENT

July 2, 1970

Forward to the Commissioner of Police
(through official channels).

I have investigated these charges and
recommend:

TRIAL

~~FILE~~


Chief Inspector

NOTE: If recommended for File or Disposition,
set forth reasons above.

NOTICE OF EXAMINATION

Mineola, N. Y., July 2, 1970

Time 1430

To Patrolman MEYER
RANK SURNAME

TAKE NOTICE that charges have been preferred against you to the Commissioner of Police and that these charges with specifications thereof are as herein set forth.

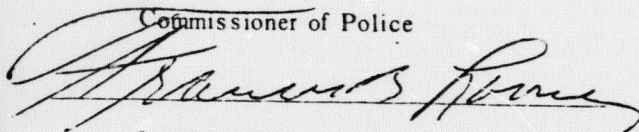
You are directed to answer in accordance with the Rules and Regulations of the Police Department at the time and place hereinafter designated.

A hearing will be held and the charges examined into by and before the Trial Commissioner at Police Headquarters, Mineola, N. Y.

July 6, 1970 1400
DATE TIME

and will be continued as ordered until concluded.

By direction of the
Commissioner of Police



I acknowledge due personal service of the within charges and specifications and notice of examination, this 2nd day of

July, 1970

at 1820 M.

Walter Meyer

Witness: Curtis Hline

Sergeant, Shift No 5
PDCN 210 - REV. 12/68 Eighth Precinct

SHORT FORM ORDER
EXHIBIT C - ORDER OF MEYER, J. DATED APRIL 27, 1971 17a
SUPREME COURT - STATE OF NEW YORK
TRIAL/SPECIAL TERM, PART 1 - NASSAU COUNTY

Present:
HON. BERNARD S. MEYER
Justice.

In the Matter of ROBERT J. CULLINAN and
WALTER J. MEYER,

Petitioners,

For a Judgment of Prohibition pursuant to
Article 78 of the CPLR

—against—

LOUIS J. FRANK, COMMISSIONER OF POLICE and
INSPECTOR CHRISTOPHER QUINN, TRIAL COMMISSIONER
OF THE POLICE DEPARTMENT OF THE COUNTY OF
NASSAU,

Respondents.

INDEX
NUMBER 4818/71 19
MOTION
DATE 4/26/71 19
MOTION
CAL. NUMBER 65
TRIAL
CAL. NUMBER

The following papers numbered 1 to 11 read on this motion. XXXXX Article 78 proceeding for
order in nature of writ of prohibition.

	PAPERS NUMBERED
XXXXX Order to Show Cause and Exhibits	1 - 9
Answering Affidavits	10 - 11
Replying Affidavits	
Affidavits	
Filed Papers	
Pleadings—Exhibits—Stipulation	
Briefs: Plaintiff's/Petitioner's	
Defendant's/Respondent's	

Upon the foregoing papers it is ~~XXXXX~~ adjudged that this proceeding is
dismissed. Prohibition does not lie to correct errors, but to prevent a body
or officer from acting in excess of jurisdiction. What is complained of is
the direction that petitioners proceed to trial. This is not a final order
of the Commissioner, CPLR 7801. Petitioners can test the propriety of the
proceedings when a final order has been made. As they concede, and as was
held in Oleshko v. New York State Liquor Authority, 29 A D 2d 84, affd.
21 N Y 2d 778, this court cannot assume that the Trial Commissioner will
transgress on petitioners' constitutional rights.

Dated APR 27 1971

SCN-8 - 105 - 1-70

J.S.C.

EXHIBIT C

EXHIBIT D - ORDER OF DISMISSAL DATED JUNE 4, 1971

18a

POLICE DEPARTMENT
COUNTY OF NASSAU, NEW YORK

COPY TO

INTERNAL CORRESPONDENCE

DATE June 4, 1971

TO Patrolman Walter J. Meyer, Shield Number 2353, Eighth Precinct

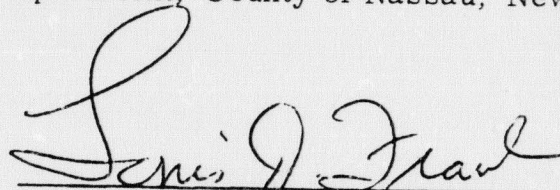
FROM Office of Commissioner of Police

SUBJECT NOTICE OF DISPOSITION, CASE NUMBER 3454, CHARGES AND SPECIFICATIONS, POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK.

1. Patrolman Meyer is hereby notified that after trial on Specification Number 1, Charges and Specifications, Case Number 3454, the Trial Commissioner recommended on May 15, 1971, to the Commissioner of Police the following:

Found Guilty - Specification Number 1

2. Patrolman Meyer is hereby notified that the Commissioner of Police on June 4, 1971, approved the above determination and recommendation of the Trial Commissioner and issued an order to said effect and that a further order was issued by the Commissioner of Police based on the determination of guilty in Case Number 3454, whereby the said Patrolman Meyer was ordered dismissed and his name dropped from the rolls of the Police Department, County of Nassau, New York, effective June 4, 1971, at 2400 hours.


Louis J. Frank
Commissioner of Police

I hereby acknowledge due personal service on me of the foregoing Notice of Disposition of Charges and Specifications, this 4TH day of JUNE 1971.

<u>PTL.</u>	<u>Meyer</u>	<u>Walter</u>	<u>2353</u>	<u>8TH</u>
Rank	Surname	Given Name	Shield Number	Command
<u>Sgt</u>	<u>W. John</u>		<u>300</u>	<u>7TH</u>
Witness:				

EXHIBIT D

EXHIBIT E - ORDER AND JUDGMENT DATED JULY 15, 1971

M E M O R A N D U M

SUPREME COURT, NASSAU COUNTY, SPECIAL TERM, PART I
Index No. 4918/71
Cal.No. 71 - 7/13/71

-----X
In the Matter of ROBERT J. CULLINAN and
WALTER J. MEYER,

Petitioners,

Reviewing the determination of the
Respondent which dismissed Petitioners
from their positions as Patrolmen and
Detectives and directing their reinstatement
and for a new hearing,

vs.

LOUIS J. FRANK, COMMISSIONER OF POLICE
and INSPECTOR CHRISTOPHER QUINN, TRIAL
COMMISSIONER OF THE POLICE DEPARTMENT
OF THE COUNTY OF NASSAU,

Respondents.

-----X
ERACKEN & SUTTER, ESQS.
Attorneys for Petitioners
50 Mineola Boulevard
Mineola, New York 11501

HON. JOSEPH JASPAN
County Attorney of Nassau County
Attorney for Respondents
Nassau County Executive Building
Mineola, New York 11501

In this proceeding pursuant to Article 78 of the CPLR
judgment is granted in favor of respondents dismissing the
petition.

Petitioners were members of the Police Department of
the County of Nassau. On June 25, 1970, they were indicted

by the grand jury of Nassau County and charged with "an attempt to commit the crime of Grand Larceny in the First Degree." On July 2, 1970, written departmental charges were prepared, charging petitioners with violating Article IX, Rules 10 and 11 of the Rules and Regulations, Police Department, County of Nassau--conduct unbecoming an officer and prejudicial to the good order and efficiency of the Police Department. A departmental hearing was scheduled for November 30, 1970, and adjourned, at the request of petitioners, to January 6, January 27, February 24, April 8, and April 22, 1971. Each adjournment was based on the ground that petitioners' attorney, John J. Sutter, Esq., of the firm of Bracken & Sutter, was actually engaged in other trials. On April 22, 1971, the Trial Commissioner, respondent Inspector Christopher Quinn, refused to ~~grant~~ another adjournment requested by James Moffitt, Esq., on behalf of John Sutter, Esq. The hearing proceeded with petitioners remaining mute at the direction of attorney Moffitt. An opportunity was afforded petitioners to cross-examine the witnesses produced to support the charges. After many pages of testimony, the hearing was adjourned until April 27, 1971, with Inspector

Quinn advising petitioners that they could appear on that date, present witnesses, offer any evidence that they wished and, if desired, the witnesses heard on April 22, would be subpoenaed to attend on April 27. On the last date, April 27, petitioners were present without counsel, stated that they were advised by Mr. Sutter to be mute, and did not participate in the brief hearing that followed.

Petitioners contend that respondents deprived them of a fundamental right to be represented by counsel of their own choosing and to confront and cross-examine witnesses, and they pray for an annulment of a decision made on June 4, 1971, dismissing them as Patrolmen in the Police Department.

The Civil Service Law, Section 75, subd. 2, does provide that "The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf." A recent case, Matter of Sowa v. Looney (23 N Y 2d 329), provides in part (p. 333)" . . . no essential element of a fair trial can be dispensed with unless waived without rendering the administrative determination subject to reversal upon review." Examination

of the minutes reveals that Inspector Quinn offered petitioners many opportunities prior to April 22 to be represented by counsel of their choosing and advised petitioners on several of the adjournments that if Mr. Sutter were not available on the adjourned date other counsel should be obtained to represent them. There comes a point at which a hearing may no longer be deferred because one particular attorney is not available. That point was reached in this matter. Ample opportunity was given petitioners to engage other counsel or to be represented by other members of the firm of Bracken & Sutter. They chose not to avail themselves of the opportunity. It may not be held that the respondent Quinn was arbitrary or unreasonable in directing the hearing to proceed.

Submit judgment on notice.

J.S.C.

AFFIDAVIT OF IRA LEITEL IN OPPOSITION TO MOTION FOR ORDER
OF DISMISSING COMPLAINT
(Filed September 16, 1975)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
WALTER J. MEYER,

Plaintiff,

-against-

LOUIS J. FRANK, Commissioner of
Police, Nassau County Police
Department, and CHRISTOPHER QUINN,
Trial Commissioner and Inspector,
Nassau County Police Department.

Defendants.
-----y

AFFIDAVIT

75 Civ. 808
(MAC)

State of New York,
County of Kings, S.S.:

IRA LEITEL, being duly sworn, deposes and says:

1. Along with David B. Ampel, Esq., I am the attorney for the plaintiff herein, Walter J. Meyer, and as such am fully familiar with all of the proceeding heretofore had herein.

2. This affidavit is submitted in opposition to the defendants' motion for an Order dismissing the complaint under Rule

12(b) of the Federal Rules of Civil Procedure, and granting judgment in favor of the defendants.

3. In paragraph "5" of the affidavit of Louis Schultz, verified the 26th day of June, 1975, (hereinafter referred to as "the Schultz affidavit"), it is alleged that the plaintiff has commenced this action against the defendant Louis J. Frank in his capacity as Commissioner of Police of the Nassau County Police Department. In Point IV at 18 of the defendants' memorandum of law in support of the instant motion, it is alleged that "(o)ne of the defendants in this action is the Nassau County Police Department." In paragraph "16" of the Schultz affidavit, the Nassau County Police Department is again referred to as a defendant in this action.

Such allegations have no basis in fact, and are clearly refuted by the very face of the pleadings itself. This action is brought against two named officials of the Nassau County Police Department, who, acting under color of state law, and under color of their authority as police officials of Nassau County, subjected plaintiff to the deprivation of his right secured by the Constitution and laws of the United States not to be compelled to give testimony which could be used against him in a criminal

prosecution. (See paragraph "1", "11" and "21" of the Complaint). This is clearly not an action against the County of Nassau, nor against the Nassau County Police Department, which, it is noted, is nowhere named as a defendant in this action. The defendants Frank and Quinn are merely identified as officials of the Nassau County Police Department; they are clearly not named in their capacity "as" Commissioner of Police and Trial Commissioner/Inspector, respectively, as defendants contend herein.

(In an action brought pursuant to 42 U.S.C., Section 1983, basing jurisdiction upon 28 U.S.C., Section 1343(3) (see paragraph "2" of the Complaint) it is entirely proper to name officials of the state government as defendants, without thus converting the action into one against the state itself. Defendants would have the Court equate an action against named officials of Nassau County with an action against the County itself. The two, however, are clearly distinguishable.

4. In paragraph "11" of the Schultz affidavit in support of this motion it is noted that:

"On July 13, 1971, the plaintiff moved, pursuant to Article 78 of the New York State Civil Practice Law and Rules, before Supreme

Court Justice MARIO PITTONI, to set aside the determination of the Police Commissioner on the ground that he had not been represented by counsel during the disciplinary proceeding.

In paragraphs "12" and "13" of the Schultz affidavit, it is urged that the issue "now being presented to this Court" and "the grounds urged in the within complaint of the plaintiff" are the refusal to grant plaintiff a further adjournment of the administrative trial "because of the non-availability of his attorney, John Sutter", or "the actual engagement of plaintiff's attorney." This, it is argued, was "set forth and urged by the plaintiff in the Courts of the State of New York." Thus, defendants urge, the instant proceeding is barred by the principles of res judicata, since identical issues in both the state and federal proceedings have been posed.

The defendants are indeed correct that such (the right to be represented by counsel of his own choosing) was the issue litigated in the Courts of the State of New York. However, it is clearly incorrect and in conflict with the very Complaint herein, to assert that such issues are "the same constitutional questions now being presented to this Court." Plaintiff nowhere alleges in his Complaint or asserts herein these litigated grounds as the

cause for or the basis of his present suit under the Civil Rights Act. As expressly noted in paragraph "7" of the Complaint, the basis for the present federal action is the deprivation herein of "the fundamental right not to be compelled to give testimony which could be used in criminal prosecution, as guaranteed by the Fifth Amendment to the Constitution of the United States, and "not to be deprived of the personal liberty to pursue a calling of his choice without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States." The basis for such claim is spelled out in paragraphs "11" and "21" of the Complaint, to wit, plaintiff was advised by his counsel "to stand mute and without the aid of counsel throughout the civil proceeding so as not to incriminate himself or otherwise prejudice the pending criminal prosecution" and "in order not to prejudice himself and his defense at the forthcoming criminal trial by his testimony and proof at the administrative proceeding." This is the sole and exclusive basis for the instant action.

On the contrary, the sole and exclusive basis for plaintiff's petition under Article 78 of the New York State Civil Practice Law and Rules (CPLR) was that plaintiff was deprived of his right to be represented by counsel of his own choosing by the arbitrary and unreasonable acts of the defendants. In fact, it was to this issue alone, the only issue raised in the state court proceed-

ings, that Mr. Justice Pittoni addressed himself:

"It may not be held that the respondent Quinn was arbitrary or unreasonable in directing the hearing to proceed," when ample opportunity was given petitioners to engage other counsel ... they chose not to avail themselves of the opportunity."

As can be most clearly seen by the full opinion of Mr. Justice Pittoni, annexed to the Complaint as Exhibit "E", the plaintiff in the state court proceeding raised only the issue of the alleged denial of the right to be represented by counsel of his own choosing and to, accordingly, confront and cross-examine witnesses. This issue is nowhere raised in the instant Complaint. On the contrary, the issue raised herein was never urged, either expressly or impliedly, upon the state courts, nor passed upon during such proceedings. The issue raised in paragraphs "1", "11" and "21" of the Complaint, was expressly and intentionally preserved for review by the federal courts. In this respect, it is telling to note that defendants, in part, acknowledge this in their memorandum of law at 5. Therein, in discussing the state court proceeding defendants state that such proceeding "was primarily predicated on the ground that he (plaintiff) had been

deprived of the opportunity to be represented by the attorney of his choosing." (Emphasis added). Factually, this is a misstatement. The state court proceeding was solely and exclusively predicated on this ground; a ground nowhere raised in the instant federal civil rights action.

Conclusive proof that the issue raised before this Court was never urged upon or considered in the state court proceeding can be found by examining the petition submitted on behalf of plaintiff in the Supreme Court, Nassau County, which is annexed hereto and made a part hereof as plaintiff's Exhibit "A1".

5. In paragraph "15" of the Schultz affidavit it is correctly noted that the applicable statute of limitations for a suit brought under the Civil Rights Act is that which the courts of the State of New York would enforce in a comparable state action - which is that of three years as prescribed by New York CPLR 214 (2). However, it does not follow that plaintiff's action was untimely commenced. As more fully set forth in plaintiff's memorandum of law in opposition to defendants' motion to dismiss the complaint herein, the cause of action for the federal interest sought to be enforced herein did not accrue, or was tolled, until

July 1973 when the motion for leave to appeal to the New York Court of Appeals was denied. Since the summons and complaint herein were served on June 10, 1975, it follows that the action was indeed timely commenced.

6. The Complaint herein clearly alleges that named officials of Nassau County, acting under color of State law, and under color of their authority as police officials of Nassau County, subjected plaintiff to the deprivation of his right secured by the Constitution and laws of the United States not to be compelled to give testimony against himself in a criminal prosecution. Further, the Complaint (paragraph "22") clearly alleges that by reason of the action of the defendants complained of herein, the plaintiff, an eighteen (18) year veteran of the Nassau County Police Department, has been severely stigmatized. His reputation in the community and in law enforcement has been effectively destroyed. He has been branded an extortioner and a crooked cop by reason of the action of the defendants herein. It therefore follows that this Court has jurisdiction over the subject matter and that the plaintiff has clearly stated a claim for which relief can be granted under Title 42, United States Code, Sections 1983 and 1985. Accordingly, the jurisdiction of this Court is properly invoked pursuant to the provisions of Title 28,

United States Code, Sections 1343(3) and (4).

WHEREFORE, your deponent respectfully prays that for these reasons and others stated herein, and in plaintiff's memorandum of law, defendants' motion for an Order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, dismissing the complaint of the plaintiff be in all respects denied.

15

IRA LEITEL

Sworn to before me

this 11th day of September, 1975.

HAROLD S. ROYER
Notary Public, State of New York
No. 31-1253615
Qualified in New York County
Commission Expires March 10, 1977

MEMORANDUM AND ORDER (Filed March 12, 1976)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
WALTER J. MEYER,

Plaintiff,

75-C-898

v.

MAR 11 1976

LOUIS J. FRANK, Commissioner of
Police, Nassau County Police
Department, and CHRISTOPHER
QUINN, Trial Commissioner and
Inspector, Nassau County Police
Department,

Defendants.

-----X
ROBERT J. CULLINAN,

Plaintiff,

75-C-1446

v.

LOUIS J. FRANK, Commissioner of
Police, Nassau County Police
Department, and CHRISTOPHER QUINN,
Trial Commissioner and Inspector, Nassau
County Police Department,

Defendants.

-----X
MEMORANDUM AND ORDER

COSTANTINO, D.J.

The motions to dismiss in the two above named cases involve identical legal issues. Since the underlying facts are likewise identical, both motions are considered in this opinion.

Before examining the legal issues involved, a brief recitation of the facts is necessary. Messrs. Cullinan and Meyer were long-standing members of the Nassau County Police Department when, in 1970, a Nassau Grand Jury indicted them both for attempted grand larceny in the first degree. Both men pled not guilty.

On the day of indictment both Cullinan and Meyer were suspended from the police department without pay; subsequently, on July 2, 1970 both men were charged by the department with violations of department regulations. They both entered not guilty pleas in this civil proceeding.

A departmental trial scheduled for November 30, 1970 was adjourned several times until April 22, 1971. On that date, plaintiffs' requests for a further adjournment were denied and the departmental trial commenced.

On advice of counsel, both men appeared without

counsel and refused to testify on their own behalf. Defendant Quinn, who was the trial examiner, found them guilty of the charges. On June 4, 1971 defendant Frank ordered that they be dismissed from the force.

In January 1972, the criminal case went to trial. On January 14, the jury returned a verdict of not guilty as to both men.

Both of the plaintiffs herein brought Article 78 proceedings in the state court seeking to set aside their removal on the grounds that they were denied their right to counsel in the administrative hearing. The Article 78 proceedings were dismissed by the New York State Supreme Court, Nassau County in August 1971. The Appellate Division, 2d Department affirmed in October 1973 and in May 1973 Cullinan was denied leave to appeal by the Court of Appeals.¹ Later, both plaintiffs petitioned defendant Frank to reconsider his order of dismissal. Reconsideration was denied. Both the New York State Supreme Court and the Appellate Division affirmed the denial of reconsideration.

¹/

The Court of Appeals denied Meyer leave to appeal in July 1973.

Plaintiffs filed these actions alleging jurisdiction pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. §§ 1983, 1985. Meyer's suit was commenced by service of summons and complaint on June 10, 1975. Cullinan's summons and complaint were served on September 5, 1975. The gravamen of plaintiffs' complaints is that the departmental trial violated their Fifth Amendment privilege against self-incrimination and their Fourteenth Amendment right to due process of law.

Defendants Frank and Quinn have moved to dismiss the complaints on various grounds. Since this court agrees that the action is barred by the statute of limitations, the other grounds need not be considered.

In determining the timeliness of an action brought under the Civil Rights Act, the federal court borrows the most analogous state statute of limitations. Swan v. Board of Higher Education, 319 F.2d 56 (2d Cir. 1963); see O'Sullivan v. Felix, 233 U.S. 318 (1914). The three-year statute of limitations prescribed by New York CPLR § 214(2) (McKinney's 1963) is the most appropriate state statute for the cases at bar. See Ortiz v. LaVallee, 442 F.2d 912, 914

(2d Cir. 1971).

Since plaintiffs were dismissed from the Police Department in June of 1971 there is no question that, absent a tolling of the statute, these actions would be barred by the statute of limitations. Plaintiffs rely on Kaiser v. Cahn, 510 F.2d 282 (2d Cir. 1974) and Mizell v. North Broward Hospital District; 427 F.2d 468 (5th Cir. 1970), reh. en banc den. (1970), in arguing that the statute was, or should have been, tolled by bringing the state court action, and that it did not begin to run again until mid 1973 when leave to appeal to the Court of Appeals was denied.

Nothing in Kaiser compels a decision that the statute should be tolled by the state court action. Mizell did not explicitly rule on the question of whether the statute of limitations therein should have been tolled, but merely remanded to the district court for reconsideration of that question in light of the federal policies involved.

The Mizell approach has been criticized and sharply limited by other courts, see, e.g., both the District Court and Court of Appeals decisions in Ammlung v. City of Chester, 355 F. Supp. 1300 (E.D. Pa. 1973); aff'd 494 F.2d 811 (3d

Cir. 1974). Moreover, in Blair v. Page Aircraft Maintenance, 467 F.2d 815 (5th Cir. 1972), Judge Tuttle, who wrote the majority opinion in Mizell, stated that the 5th Circuit Court of Appeals had overruled Mizell sub silentio by failure to consider its application to the facts in Blair, 467 F.2d at 821 (Tuttle, J., dissenting). It is not necessary, however, to determine to what extent Mizell has been overruled by Blair or limited by Ammlung because the Supreme Court has recently set forth guidelines to be considered in determining whether federal courts should fashion a tolling provision when dealing with a state statute of limitations. Johnson v. Railway Express Agency, 421 U.S. 454 (1975).

In Railway Express, plaintiff argued that the state statute of limitations, applicable to his § 1981 claim, should have been tolled by his timely filing of an employment discrimination charge based on the same facts with the Equal Opportunity Commission. The Court began its analysis with the proposition that although federal policy considerations may sometimes overrule inconsistent state statutes of limitation, federal courts generally should rely on the state's "wisdom" as to time limitations and tolling periods. 421 U.S. 464-65. The Court expressly

noted, however, that the filing of a Title VII claim was not a prerequisite to bringing a § 1981 action, and that the two avenues of relief were independent, 421 U.S. at 460. Johnson (the plaintiff in that case) could have filed his § 1981 action at any time after his cause of action had accrued; had he done so he could then have asked that the § 1981 proceedings be stayed until the Title VII claim was determined. 421 U.S. at 465-66. Accordingly, the court found no persuasive federal policy requiring that the statute be tolled, and therefore held that the action was barred by the statute of limitations.

The analysis in Railway Express leads to a similar conclusion in the cases at bar. In interpreting the Civil Rights Act, the Supreme Court has pointed out that

[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Monroe v. Pape, 365 U.S. 167, 183 (1961).

Furthermore, an adverse decision in state court is not necessarily a bar to the federal suit. Lombard v. Bd. of Education, 502 F.2d 631 (2d Cir. 1974). In Lombard, plaintiff raised issues of statutory construction in the

state court and then sought to raise constitutional issues in the federal court. In holding that the federal suit was not barred by the doctrines of res judicata or collateral estoppel, the court of Appeals said:

Here, even if we would like to put all the issues in the same court, we are better off not to compel the plaintiff to seek constitutional redress in the state court or statutory construction in the federal court [citations omitted] That is what we think choice of forum means in Civil Rights Act cases.

2

502 F.2d at 636/

Under Lombard, plaintiffs' right to bring these claims at all, is directly dependent upon a finding that the claim advanced in state court was different from the claim

2/

The cases at bar are clearly distinguishable from Lombard in that here plaintiffs have raised one constitutional issue (right to be represented by counsel) in state court and now seek to raise two other constitutional issues (right against self incrimination and right not to be deprived of their calling without due process of law) in federal court. For purposes of determining whether the suit is time barred, it will be assumed that plaintiffs may validly raise these claims in federal court; nevertheless, it must be noted that plaintiffs are arguably seeking two bites at the "cherry." Lombard, supra at 637.

advanced in federal court. If, however, the claims are different and alternative to each other, then the reasoning in Railway Express must control. As was true in Railway Express, plaintiffs could have filed their suits at any time after the cause of action accrued. By failing to do so, they, like the plaintiff in Railway Express have "slept" on their rights.

In Railway Express, the Supreme Court adopted a narrow view of the impact of that case on federal policies. 421 U.S. at 467, fn. 13. Whether the impact of the cases at bar is viewed narrowly or broadly, no federal policy persuades this court that the statute of limitations should be tolled under these circumstances.

Accordingly, the motions to dismiss are granted.


U. S. D. J.

50 A D2d 803

41a

NOTICE OF MOTION TO DISMISS COMPLAINT
(Filed June 30, 1975)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

WALTER J. MEYER,

Plaintiff,

-against-

LOUIS J. FRANK, Commissioner of
Police, Nassau County Police
Department, and CHRISTOPHER QUINN,
Trial Commissioner and Inspector,
Nassau County Police Department.

Civil Action No.
75 Civ. 898

Defendants.

-----X

S I R:

PLEASE TAKE NOTICE, that upon the annexed affidavit of
LOUIS SCHULTZ, Senior Deputy County Attorney of Nassau County,
duly sworn to the 26th day of June, 1975, the summons and com-
plaint heretofore served herein, and the Memorandum of Law sub-
mitted herewith, the undersigned will move this Court at a
stated term for motions thereof, before JUDGE MARK A. COSTANTINO,
to be held in Court Room 1, Second Floor, at the United States
Court House, 225 Cadman Plaza East, Brooklyn, New York, on the
24th day of July, 1975, at 10 o'clock in the forenoon of that
day, or as soon thereafter as counsel can be heard, for an Order
pursuant to Rule 12(b) of the Federal Rules of Civil Procedure,

dismissing the complaint of the plaintiffs, and granting judgment in favor of the defendants on the grounds that:

(1). The action has not been timely instituted, as provided by Section 214(2) of the New York State Civil Practice Law and Rules;

(2). the Court lacks jurisdiction over the subject matter;

(3). the matter has been completely adjudicated on the same issues in the Courts of the State of New York;

(4). there is a failure to state a claim upon which relief can be granted to the plaintiff upon his complaint;

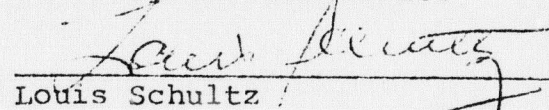
And for such other and further relief as to the Court may seem just and proper.

DATED: Mineola, New York
June , 1975

Yours, etc.

JOHN F. O'SHAUGHNESSY
County Attorney of Nassau County
Attorney for Defendants

By


Louis Schultz
Senior Deputy County Attorney
Of Counsel
Office and P.O. Address
Nassau County Executive Building
Mineola, New York 11501
Tel. No. 516 535-3403

TO: DAVID B. AMPEL
by IRA LEITEL, Of Counsel
Attorneys for Plaintiff
Office and P.O. Address
188 Montague Street
Brooklyn, New York 11201

AFFIDAVIT OF LOUIS SCHULTZ IN SUPPORT OF MOTION

43a

UNITED STATES DISTRICT C T
EASTERN DISTRICT OF NEW YORK

-----X

WALTER J. MEYER,

Plaintiff,

-against-

LOUIS J. FRANK, Commissioner of
Police, Nassau County Police
Department, and CHRISTOPHER QUINN,
Trial Commissioner and Inspector,
Nassau County Police Department,

Civil Action No.
75 Civ. 898

Defendants.

-----X

STATE OF NEW YORK)
) SS:
COUNTY OF NASSAU)

LOUIS SCHULTZ, being duly sworn, deposes and says:

1. I am a Senior Deputy County Attorney of Nassau
County, associated with JOHN F. O'SHAUGHNESSY, County Attorney
of Nassau County, attorney for the defendant herein.

2. This affidavit is submitted in support of the
motion to dismiss the complaint of the plaintiff on the following
grounds:

a. The Court has no jurisdiction over the subject
matter for declaratory judgment in that there is no diversity of

of citizenship and the minimum jurisdictional amount for Federal Court jurisdiction has not been alleged in the complaint;

(b) the Declaratory Judgment Act, 28 U.S.C., § 2201, does not confer jurisdiction on the Federal Court where none otherwise exists;

(c) there has been a complete prior adjudication of the issues presented herein in the Court of the State of New York;

(d) the complaint fails to state a claim for which relief may be granted.

3. The defendants herein were served with copies of the summons and complaint in this action on June 10, 1975. The time to answer the complaint has not yet expired.

4. Your deponent is fully familiar with all of the facts pertaining to the disciplinary proceedings conducted against the plaintiff by the Nassau County Police Department, and he is also familiar with the Article 78 proceeding commenced by the plaintiff in the Supreme Court of the State of New York, where a decision was rendered and judgment entered on behalf of the defendants, which judgment was affirmed without opinion by the Appellate Division of the Supreme Court of the State of New York, with leave to appeal to the Court of Appeals of the

State of New York having been denied. All of those papers, records, transcripts and documents are in the possession of your deponent, which enables your deponent to make this affidavit in support of this motion to dismiss the complaint of the plaintiff on the grounds hereinabove set forth.

5. The plaintiff has commenced this action against the defendant, LOUIS J. FRANK, in his capacity as Commissioner of Police of the Nassau County Police Department, solely by reason of the fact that said defendant, as such Police Commissioner, had ordered the dismissal of the plaintiff from the Nassau County Police Department after completion of the disciplinary proceedings conducted against the plaintiff, and the said defendant, LOUIS J. FRANK, had also ordered the suspension of the plaintiff, pending the said police disciplinary proceedings.

6. The action commenced against the defendant, Christopher Quinn, who is an Inspector of Police in the Nassau County Police Department, is predicated on the fact that the said Christopher Quinn was the Trial Commissioner appointed by LOUIS J. FRANK, Commissioner of Police, to conduct the disciplinary proceedings against the plaintiff, and to report his findings to the said LOUIS J. FRANK.

7. The thrust of the complaint against the said defendant, Christopher Quinn, is that the said plaintiff, after numerous postponements of the disciplinary trial, at the request of the attorney for the plaintiff on the ground that the plaintiff's attorney was actually engaged, was directed to appear on April 22, 1971 with John J. Sutter, his attorney or with another attorney in that office, or with any other attorney of his own selection, for the purpose of standing trial in the said disciplinary proceedings that had been originally scheduled for November 30, 1970. Plaintiff was duly advised by the said defendant, Christopher Quinn, that no further postponements would be granted. On April 22, 1971, when plaintiff, by his attorney, requested a further adjournment, such application was denied and the disciplinary trial was commenced on the said day, without any participation on the part of plaintiff's attorney.

8. At the conclusion of the taking of testimony in connection with the said disciplinary proceeding on the said 22nd day of April, 1971, the said Trial Commissioner, Inspector Christopher Quinn, advised the plaintiff and the other patrolman who was being tried at the same time for the same disciplinary charge, namely, Patrolman Cullinan, that the matter was being adjourned to April 27, 1971, at 10 a.m., in order to afford to

to the plaintiff and the other patrolman, an opportunity to present witnesses, and also to afford to the said plaintiff and the other patrolman, an opportunity to have their attorney present to represent them at that time. The plaintiff and the other patrolman did not take advantage of that opportunity. That attached hereto and made a part hereof are Pages 168 and 169 of the transcript of the disciplinary proceedings showing such postponement for the aforementioned purpose.

9. The plaintiff in his complaint has attached thereto and marked "Exhibit B", a copy of the charges and specifications, which was the subject of the disciplinary proceeding. He has also attached to his complaint and marked "Exhibit C", the decision of Supreme Court Justice Bernard S. Meyer, denying the application of the plaintiff to stay the disciplinary trial which had been postponed to April 27, 1971, as aforementioned.

10. That under date of June 4, 1971, there was served upon the plaintiff on behalf of the defendant, LOUIS J. FRANK, Commissioner of Police, the notice of disposition ordering the dismissal of the plaintiff from the Nassau County Police Department. That the plaintiff has attached to his complaint, which he has identified as Exhibit "D", a copy of that notice which

indicates the receipt thereof by the plaintiff on the 4th day of June, 1971.

11. On July 13, 1971, the plaintiff moved, pursuant to Article 78 of the New York State Civil Practice Law and Rules, before Supreme Court Justice MARIO PITTONI, to set aside the determination of the Police Commissioner on the ground that he had not been represented by counsel during the disciplinary proceeding. The petition of the petitioner was dismissed by MR. JUSTICE PITTONI, and the plaintiff has attached to his complaint and identified as "Exhibit E", a copy of the memorandum decision of MR. JUSTICE PITTONI. In Paragraph "17" of the complaint, the plaintiff has quoted part of the language in the memorandum decision of MR. JUSTICE PITTONI, covering the very point which is the very subject of the plaintiff's present complaint in this Court. MR. JUSTICE PITTONI found that the defendant, Inspector Quinn, the Trial Commissioner, during the plaintiff's disciplinary proceeding, was neither arbitrary nor unreasonable in refusing to grant the petitioner any further adjournment of the trial when the plaintiff continued to press for such further adjournment because of the non-availability of his attorney, John Sutter. In Paragraph "10" of the complaint of the plaintiff, he concedes and alleges that the judgment of

MR. JUSTICE PITTONI was affirmed without opinion, by the Appellate Division of the New York State Supreme Court; that a motion for reargument before the Appellate Division of the New York Supreme Court was denied, and that the motion for leave to appeal from the aforementioned judgment of MR. JUSTICE PITTONI was denied by the New York State Court of Appeals. All of the grounds urged in the within complaint of the plaintiff were set forth and urged by the plaintiff in the Courts of the State of New York.

12. Under date of April 6, 1973, the plaintiff and his fellow officer, Robert J. Cullinan moved, by notice of motion, before the Court of Appeals of the State of New York, for leave to appeal from the aforementioned judgment of MR. JUSTICE PITTONI, which motion was returnable in that Court on April 30, 1973. That is the motion which the plaintiff alleges in Paragraph "18" of his complaint, which was denied by the New York State Court of Appeals in July 1973. That attached hereto and made a part hereof is a copy of that notice of motion; affirmation by plaintiff's attorney; affirmance of the judgment of MR. JUSTICE PITTONI of the Appellate Division of the New York Supreme Court dated October 10, 1972; the denial of the motion for reargument by the Appellate Division of the New York State Supreme Court dated January 19, 1973, and a copy of the brief

submitted on behalf of the plaintiff to the Court of Appeals of the State of New York, all of which is set forth as "Exhibit II". The Court will note that in the said brief, there has been raised on behalf of the plaintiff and his fellow police officer, the actual engagement of plaintiff's attorney. This exhibit is submitted as further evidence that the allegations set forth in the plaintiff's complaint have been reviewed and considered by the New York State Court of Appeals, and that his application for leave to appeal from the judgment of MR. JUSTICE PITTONI was denied by the said New York State Court of Appeals.

13. It is, therefore, quite apparent that the plaintiff, in his proceedings commenced in the New York State Supreme Court, argued in the Appellate Division of the New York State Supreme Court and the New York State Court of Appeals, actually litigated the same constitutional questions now being presented to this Court, as an illegal basis for declaratory judgment. The State Courts were competent and had jurisdiction to decide the questions raised by the plaintiff in his present complaint, and said questions were decided adversely against the plaintiff.

14. As has been stated in previous decisions rendered by the Federal Courts, Federal Courts are not granted exclusive jurisdiction to enforce constitutional rights. Since the question of plaintiff's constitutional rights were fully litigated in the State Courts, there is no compelling Federal interest in this

case which militates against according res judicata effect to the determinations made by the Police Commissioner of the Nassau County Police Department, the New York State Supreme Court, the Appellate Division of the New York State Supreme Court, and the New York State Court of Appeals. The only purpose attempted by the plaintiff for the commencing of this action is to seek to have this Court relitigate his alleged Federal claim, which was presented to and decided by the aforementioned courts of the State of New York. The plaintiff, therefore, has no right to seek such direct review of the aforementioned State Court decisions in this Court. To permit the plaintiff to do so, would give to this Court the right to Appellate jurisdiction in this matter over the decisions of the New York State Supreme Court, the Appellate Division of the New York State Supreme Court and the New York State Court of Appeals. The jurisdiction possessed by the United States District Court is strictly original, and this Court does not have such Appellate jurisdiction. The State of New York provided an adequate means for the vindication of the plaintiff's constitutional interests, and the plaintiff's claim in the Courts of the State of New York that he had been deprived of his constitutional rights, was in all respects rejected by the New York State Courts.

15. Plaintiff in Paragraph "1" of his complaint alleges that he is seeking declaratory relief pursuant to the provisions of Title 42, United States Code, §§ 1983 and 1985. There is no dispute from a reading of the contents of "Exhibit D" attached to the complaint of the plaintiff, that the plaintiff acknowledged due personal service of his notice of dismissal on June 4, 1971. This suit, which challenges the dismissal of the plaintiff on the ground that he was deprived of his civil rights, under Title 42, § 1983 of the United States Code, must be brought within the applicable statute of limitations, which the State Courts would enforce in a comparable State action. The Court recognizes this rule of law, since there is no Federal statute of limitations on this subject, and such State statute of limitations is applicable in this case since there is no diversity of citizenship herein. Pursuant to the provisions of Section 214(2) of the New York State Civil Practice Law and Rules, which is the section applicable to an action to recover upon a liability created or imposed by statute, such action must be commenced within three years. It was, therefore, incumbent upon the plaintiff to commence the within action in this Court within three years from the 4th day of June, 1971. The summons and complaint, which should have been served on or before the 4th day of June, 1974, was

served on the 10th day of June, 1975. Plaintiff's action has, therefore, not been timely commenced, and in addition to the reasons set forth above, his complaint should be dismissed for not having been commenced within the applicable three year statute of limitations.

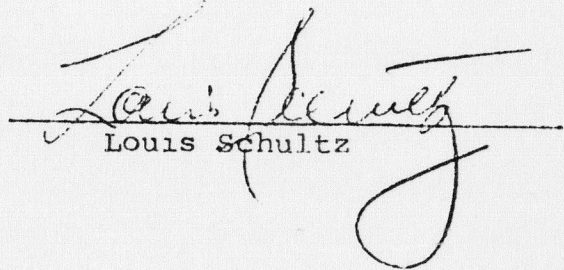
16. In addition to the foregoing, the Court has no jurisdiction in this action over the defendant, NASSAU COUNTY POLICE DEPARTMENT. As has been repeatedly and consistently determined by the Federal Courts, the Nassau County Police Department is not such a "person" as was intended by the provisions of Title 42, United States Code, § 1983.

17. The complaint of the plaintiff fails to indicate that this Court has jurisdiction over the subject matter or that the request of the plaintiff in his complaint for a declaratory judgment confers jurisdiction on this Court, and the plaintiff also fails to state a claim for which relief can be granted.

WHEREFORE, your deponent respectfully requests that the complaint of the plaintiff be dismissed on the grounds set forth in the notice of motion and spelled out in the within affidavit, which is further supported by the accompanying memorandum of law, and your deponent, on behalf of the defendants, further requests

such other and further relief as to this Court may seem just and proper.

Sworn to before me this
26th day of June, 1975.


Louis Schultz

Notary Public

ROSLYN HAND
NOTARY PUBLIC, State of New York
No. 30-1657165
Qualified in Nassau County
Commission Expires March 20, 1977

EXHIBITS ANNEXED TO AFFIDAVIT OF LOUIS SCHULTZ:

1

Abate

2

Q What was in the boxes?

3

A Sweaters.

4

Q Where did you go to?

5

A Ellen drove Anita to the bus stop.

6

Q What did Anita do?

7

A Got out.

8

Q Where did she go?

9

A She took the bus.

10

Q MR. MELTZER: Thank you very much.

11

I am through with the witnesses.

12

TRIAL COMMISSIONER: Patrolman Cullinan and Meyer, if you wish you may cross-examine the witness. If you have any objections to the testimony or any statements to make in regard to it at this time, you can make them.

16

17

You are excused.

18

MR. MELTZER: This is the County's case.

19

The County rests.

20

TRIAL COMMISSIONER: At this time, Patrolman Cullinan or Meyer, if you wish to make any statement of any kind with regard to any part of the proceeding we have had so far, you are at liberty to do so, and I would also advise you that at this point I am adjourning the case until

24

25

EXHIBIT "1"



Abate

169

Tuesday, April 27th at 10 hundred in this room.

Is this convenient to you, Counsel?

MR. MELTZER: Yes. I will make it convenient.

TRIAL COMMISSIONER: If you wish at that time, you can bring in any evidence you wish to controvert what has been presented, any witnesses that you want to present. If your attorney wishes to come at this time or any attorney to represent you in this part of the case, you may do so.

If any of the witnesses that have appeared today you wish to subpoena, if you will notify Deputy Chief Inspector Looney of the Training Division, we will attempt to subpoena the witnesses for you.

Has anybody anything else that they would like to bring before this hearing today before the adjournment? Mr. Meltzer?

MR. MELTZER: No.

TRIAL COMMISSIONER: Gentlemen?

THE RESPONDENTS: No response.

TRIAL COMMISSIONER: We are adjourning until 10:00 a.m. on April 27th when we will have this hearing. We will start it and if you have anything to offer, we will accept it.

This hearing is adjourned.



EXHIBIT II - NOTICE OF MOTION

57a

COURT OF APPEALS OF THE STATE OF NEW YORK

In The Matter Of

ROBERT J. CULLINAN and WALTER J. MEYER,

Petitioners-Appellants,

Reviewing the determination of the Respondent
which dismissed Petitioners from their positions
as Patrolmen and Detectives and directing their
reinstatement and for a new hearing,

-against-

NOTICE OF MOTION

LOUIS J. FRANK, Commissioner of Police, and
INSPECTOR CHRISTOPHER QUINN, Trial Com-
missioner of the Police Department of the County
of Nassau,

Respondents.

S I R :

PLEASE TAKE NOTICE that upon the annexed affirmation of MARTIN I.
SILBERG, ESQ., dated the 6th day of April, 1973, the undersigned will move
this court at a term thereof at the courthouse located on Eagle Street, Albany,
New York on the 30th day of April, 1973 at 2:00 p.m. in the afternoon of that
day, or as soon thereafter as counsel can be heard for an Order permitting an
appeal to the Court of Appeals, from a decision of the Appellate Division,
Second Department, affirming a decision of the Supreme Court of the State of
New York, refusing to review the determination of the Respondent, or such
other and further relief as this Court may seem just and proper.

Dated: April 6, 1973

Yours, etc.,

TO:

Goldstein, Silberg & Hauptman
Attorneys for Petitioners-
Appellants.

HON. JOSEPH JASPAN
County Attorney: Nassau County
Nassau County Executive Building
West Street, Mineola, New York 11501
(516) 535-2990

5302 Merrick Road
Massapequa, New York 11758
(516) 541-2700

AFFIRMATION OF MARTIN I. SILBERG IN SUPPORT OF MOTION
COURT OF APPEALS OF THE STATE OF NEW YORK

58a

In The Matter Of

ROBERT J. CULLINAN and WALTER J. MEYER,

Petitioners-Appellants,

Reviewing the determination of the Respondent
which dismissed Petitioners from their positions
as Patrolmen and Detectives and directing their
reinstatement and for a new hearing,

-against-

AFFIRMATION

LOUIS J. FRANK, Commissioner of Police, and
INSPECTOR CHRISTOPHER QUINN, Trial Com-
missioner of the Police Department of the County
of Nassau,

Respondents.

STATE OF NEW YORK)
COUNTY OF NASSAU) SS.:

MARTIN I. SILBERG, an attorney duly licensed to practice law in the
State of New York, hereby affirms the following to be true under the penalties
of perjury:

That I am the attorney for the above-named petitioners, who request
permission from this Court to appeal from decisions of the Appellate Division,
Second Department of the State of New York; The first decision appealed from
is an Order of that court dated October 10, 1972 affirming the judgment of the
Supreme Court of Nassau County, which was entered on August 10, 1971; the
second decision appealed from is a denial of a motion by the Petitioners-
Appellants to re-argue the aforementioned decision. Such later decision was
dated January 19, 1973, and there were no opinions rendered in either order.
Neither order was served upon counsel of the Petitioners-Appellants until
April 3, 1973.

Your affiant has annexed hereto a brief pursuant to the rules of the
Court of Appeals, Sec. 500.9.

WHEREFORE, your affiant respectfully prays that this Court issue an
Order permitting the Petitioners-Appellants to appeal from both orders of the

Appellate Division, Second Department.

Dated: April 6, 1973

Martin I. Silberg
MARTIN I. SILBERG

ORDER DENYING REARGUMENT

G

60a

At a Term of the Appellate Division of the Supreme Court
of the State of New York, Second Judicial Department,
held in Kings County on October 10, 1972

~~HON. SAMUEL RABIN, Presiding Justice~~

HON. JAMES D. HOPKINS

~~HON. FRED J. MUNDER~~

HON. M. HENRY MARTUSCELLO

~~HON. HENRY J. LATHAM~~

HON. J. IRWIN SHAPIRO

~~HON. FRANK A. GILLOTTA~~

HON. MARCUS G. CHRIST

HON. ARTHUR D. BRENNAN

~~HON. A. DAVID BENJAMIN~~

Acting Presiding Justice

Associate Justices

In the Matter of
Robert J. Cullinan et al.,

Appellants,

v.

Louis J. Frank, Commissioner of Police
Nassau County, et al.,

Respondents.

Order on Appeal
from Judgment—Civil Action
or Proceeding

In the above entitled cause, the above named Robert J. Cullinan et al.,
petitioners,
having appealed to this court from a judgment of the Supreme Court, Nassau
County ~~County~~ entered August 10, 1971;

the said appeal having been argued by

Martin I. Silberg,

Natale C. Todone,

Esq., of counsel for the appellant, and by

Esq., of counsel for the respondent,

due deliberation having been had on said appeal, and upon this court's decision
slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed,
without costs.

At a Term of the Appellate Division of the Supreme Court
of the State of New York, Second Judicial Department,
held in Kings County on January 19, 1973.

61a

HON. ~~SAMUEL H. HANCOCK~~
HON. JAMES D. HOPKINS, Acting Presiding Justice.

HON. ~~FRANK J. MONTANO~~
HON. M. HENRY MARTUSCELLO

HON. ~~FRANK J. MONTANO~~

HON. J. IRWIN SHAPIRO

HON. ~~FRANK J. MONTANO~~

HON. MARCUS G. CHRIST

HON. ARTHUR D. BRENNAN

HON. ~~FRANK J. MONTANO~~

Associate Justices

IN THE MATTER OF ROBERT J. CULLINAN,
et al.,

Appellants,

v.

LOUIS J. FRANK, Commissioner of Police,
Nassau County, et al.,

Respondents.

Order on Motion to Reargue Appeal
~~Order on Motion to Reargue Appeal~~

In the above entitled cause, the above named Robert J. Cullinan, et al., appellants, having moved for reargument of their appeal from a judgment of the Supreme Court, Nassau County, entered August 10, 1971, which was unanimously affirmed by order of this court dated October 10, 1972;

Now, upon the papers filed in support of said motion and the papers filed in opposition thereto; upon the papers on which the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is:

ORDERED that the motion is hereby denied.

PETITIONERS-APPELLANTS' BRIEF

COURT OF APPEALS OF THE STATE OF NEW YORK

In The Matter Of

ROBERT J. CULLINAN and WALTER J. MEYER,

Petitioners-Appellants,

Reviewing the determination of the Respondent which dismissed Petitioners from their positions as Patrolmen and Detectives and directing their reinstatement and for a new hearing,

-against-

LOUIS J. FRANK, Commissioner of Police, and INSPECTOR CHRISTOPHER QUINN, Trial Commissioner of the Police Department of the County of Nassau,

Respondents.

PETITIONERS-APPELLANTS' BRIEF

Goldstein, Silberg & Hauptman
Attorneys for Petitioners-Appellants
5302 Merrick Road
Massapequa, New York 11758
(516) 541-2700

MARTIN I. SILBERG
of Counsel

Petitioners-Appellants brief in support of their motion
to permit an appeal to the Court of Appeals of the State of New York.

STATEMENT

The Petitioners-Appellants ROBERT J. CULLINAN and WALTER J. MEYER submit this brief in support of their motion to permit an appeal to this Court. The Appellants appealed to the Appellate Division, Second Department from a decision of Justice Mario Pittoni of the Supreme Court of the State of New York, dated July 15, 1971, which dismissed their petition for a review of the respondents' action in conducting a Police Department Trial and Hearing resulting in the dismissal of both petitioners from the Nassau County Police Department.

✓ They further appeal from a decision of the Appellate Division denying their motion to reargue. The two orders are dated October 10, 1972 and January 19, 1973 respectively.

The two petitioners, formerly Detectives of the Nassau County Police Department were, on July 2, 1970, charged by the Police Department with certain violations of the rules and regulations of the Bureau, to wit, attempted extortion. On June 25, 1970, a Grand Jury of the County of Nassau indicted both for the crime of an Attempt to Commit the Crime of Grand Larceny in the First Degree. The petitioners plead not guilty in both proceedings.

The Police Department conducted a hearing on April 22, 1971, as a result of which both men were fired from the force. This took effect on June 4, 1971.

They were then jointly tried in the Supreme Court in Nassau County and were acquitted by a jury.

POINT 1

THE APPELLANTS WERE EFFECTIVELY DENIED
THE RIGHT TO COUNSEL OF THEIR CHOICE.

Prior to their trial in the Supreme Court on the criminal charges, the Appellants were represented by a well-known criminal lawyer named John Sutter of Mineola, who was well experienced in the Criminal Law and had been the attorney for the Patrolmens Benevolent Association in Nassau County. This is the first time in the history of the County that Police Officers were to be tried by a Departmental Hearing prior to the disposition of the criminal charges involving the same act. Due to the log jam in the County Court of Nassau County, the Appellants' case had been delayed to the point where the Police Department moved the hearing to a conclusion. During the period from November 30, 1970 to April 22, 1971, Mr. Sutter had been engaged in a rather long criminal case in New York City. He had requested several adjournments which had been granted to him. On April 8, 1971 the Police Department requested an adjournment which was consented to by Mr. Sutter. Mr. Sutter was prepared on that date. Approximately two (2) weeks later, Mr. Sutter was then engaged again on another criminal matter. The Appellants were advised by Mr. Sutter to remain mute throughout the hearing, which they

did, and which resulted in their immediate dismissal.

POINT 2

SUBSTANTIAL JUSTICE REQUIRES THE
GRANTING OF THIS MOTION.

Subsequently, Martin I. Silberg, Esq., of this office represented the Appellants at their criminal trial and on their appeal to the Appellate Division.

During the argument of the appeal in that court, Justice Shapiro requested that I submit documentation indicating that (1) An adjournment had, in fact, been requested by the Police Department, and (2) That this was, in fact, the first time the Police Officers were tried in the department prior to their criminal trial. The only one who could provide valid documentation on those points was Mr. Sutter. The appellants were under the impression that no decision would be forthcoming until that documentation was provided to the court.

The argument of the appeal took place during the morning of September 7, 1972. Unknown to the Appellants, an order denying the appeal had been issued forth from the Appellate Division on October 10, 1972. That order was never served upon the Appellants until April 3, 1973. The Appellants learned of the adverse decision during casual conversation between their attorney and the County Attorney's office. A motion to reargue was made on the grounds that the affidavit of Mr.

Sutter was not received by the Appellants until October 18, 1972 and forwarded to the Court on the following day. Therefore, that tribunal could not have considered these vital issues since they made their decision prior to receiving Mr. Sutter's affidavit.

The Appellants were two detectives who have accumulated between them 27 unblemished years of police work. At their criminal trial fourteen (14) character witnesses, ranging from inspectors to captains and lieutenants, testified on their behalf. The testimony of the witnesses who had testified at the Departmental Hearing, but who had not been subjected to cross-examination, indicated beyond all doubt, the innocence of these men. Now, in effect, they find themselves in a "Catch-22" situation. Naturally, since they were acquitted at the Criminal Trial, that record had never been before any Appellate Court. In effect, their reputations and careers have been wrecked on two occasions by the neglect of their former attorney. The first time, when he failed to represent them at their Departmental Hearing, and the second time, when in spite of their entreaties, he submitted his affidavit over seven (7) weeks after the appeal had been argued. They have paid a terrible price for this abuse and request that this Court permit them to check the entire record, including, if this Court desires, the record of their trial in which they were acquitted. Substantial justice we respectfully submit requires that this Court grant such permission.

CONCLUSION

THE PETITIONERS-APPELLANTS SHOULD BE
PERMITTED TO APPEAL TO THIS COURT.

Respectfully submitted,

Goldstein, Silberg & Hauptman
Attorneys for Petitioners-
Appellants.

MARTIN I. SILBERG
of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

... LUTZ APPELLATE PRINTERS, INC.

WALTER J. MEYER,
Plaintiff- Appellant,

- against -

LOUIS J. FRANK et al.,
Defendants- Appellees.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF

NEW YORK

ss.:

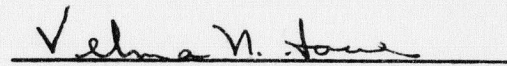
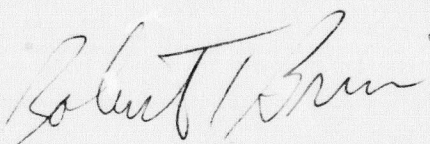
I, Velma N. Howe *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
298 Macon Street, Brooklyn, New York 11216
That on the 11th day of June 19 76, deponent served the annexed

Appendix ~~Exhibit~~ upon John F. O'Shaughnessy County Attorney attorney(s) for
Nassau County

Defendants- Appellees in this action, at Nassau County Executive Building West Street

Mineola, New York 11501 *the address designated by said attorney(s) for that*
purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a
Post Office Official Depository under the exclusive care and custody of the United States Post Office
Department, within the State of New York.

Sworn to before me, this 11th
day of June 19 76



VELMA N. HOWE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977